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Opinion No. 13-86

Expunction of Criminal Records Under Tenn. Code Ann. § 40-32-101(g)

QUESTIONS

1. Under Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(B), what type of felony or misdemeanor offense committed prior to November 1, 1989, involved "by its nature, a substantial risk that physical force against the person of another would be used in the course of committing the offense"?

2. If an offense meets the criteria under Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(B), would an attempt to commit that offense also meet the criteria?

3. Does the classification of a felony affect a person's ability to obtain an expunction of a criminal record pursuant to Tenn. Code Ann. § 40-32-101(g)(1)(C)?

4. Under Tenn. Code Ann. § 40-32-101(g)(1)(C)(i) and (ii), is a person's ability to obtain an expunction affected when the person's actual sentence served was less than the amount of time mandated by the statute for the conviction offense for which expunction is sought?

5. Does the language of Tenn. Code Ann. § 40-32-101(g)(2)(A), which states that "the person has never been convicted of any criminal offense, including federal offenses and offenses in other states, other than the offense committed for which the petition for expunction is filed," mean that the person can only apply for expunction if the offense that the person is seeking to expunge is the only offense for which the person was convicted?

6. Is Tenn. Code Ann. § 40-32-101(g) unconstitutionally vague?

OPINIONS

1. Because the determination of whether a particular offense would satisfy the criteria under Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(B) is necessarily factual on a case-by-case basis, it is not possible to provide a specific list of the offenses that would render a person ineligible under that statute for expunction of a record of conviction.

2. Because the determination of whether an attempt to commit a particular offense would satisfy the criteria under Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(B) is necessarily

factual on a case-by-case basis, it is not possible to provide an opinion in response to the question.

3. No.

4. No.

5. Yes.

6. No.

ANALYSIS

1. On July 1, 2012, Tenn. Code Ann. § 40-32-101(g) became effective. 2012 Tenn. Pub. Acts ch. 1103, § 3. This statute allows certain nonviolent offenders to petition for expunction of their criminal records if they are otherwise eligible. Tenn. Code Ann. § 40-32-101(g). One of the requirements for eligibility to petition for expunction of a person's felony or misdemeanor conviction is that the offense, committed prior to November 1, 1989, "[d]id not involve, by its nature, a substantial risk that physical force against the person of another would be used in the course of committing the offense." Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(B). In order to determine whether an offense satisfies this criterion, a trial court must examine the facts and circumstances surrounding the commission of the offense, rather than merely examining the statutory elements of the offense. *Compare* Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(B) ("[d]id not involve, by its nature a substantial risk that physical force against the person of another would be used in the course of committing the offense") *with* Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(A) (" [d]id not have as an element the use, attempted use, or threatened use of physical force against the person of another"). Because the determination is factual on a case-by-case basis, it is not possible to provide a specific list of the offenses that would render a person ineligible to petition for expunction under Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(B).

2. The provisions of Tenn. Code Ann. § 40-32-101(g)(1)(C) apply only to convictions for felonies and misdemeanors committed prior to November 1, 1989. Prior to that date, an attempt to commit a criminal offense required three elements: (1) an intent to commit a specific crime, (2) an overt act, and (3) failure to consummate the crime. *State v. Staggs*, 554 S.W.2d 620, 623 (Tenn. 1977). For the same reasons expressed in the analysis of Question 1, the determination of whether an attempt would involve, by its nature, a substantial risk that physical force against the person of another would be used in committing the offense is a factual one to be made on a case-by-case basis. Therefore, it is not possible to provide a categorical response to the question posed.

3. Nothing in the language of Tenn. Code Ann. § 40-32-101(g)(1)(C) can be read to suggest that the class of the felony affects a person's ability to obtain under that provision the expunction of the record of a prior felony. Indeed, as noted above, Tenn. Code Ann. § 40-32-101(g)(1)(C) contemplates only offenses committed prior to November 1, 1989, and prior to that date, the classification of offenses as Class A, B, C, D, and E felonies and Class A, B, and C

misdemeanors, as prescribed by current law, did not exist. *Compare* Tenn. Code Ann. §§ 40-35-101 to -505 (codifying Tennessee Criminal Sentencing Reform Act of 1989 as amended, which classified felonies and misdemeanors) *with* Tenn. Code Ann. §§ 40-35-101 to -504 (1982) (codifying Tennessee Criminal Sentencing Reform Act of 1982), *repealed by* 1989 Tenn. Pub. Acts ch. 591, § 1.

4. The requirements for eligibility for expunction of a person's convictions for a felony or misdemeanor committed prior to November 1, 1989 are set forth by Tenn. Code Ann. § 40-32-101(g)(1)(c). Section 40-32-101(g)(1)(C)(i) requires that "[t]he person was sentenced to a determinate sentence of three (3) years or less." The plain language of this provision provides that this requirement is met if the sentence imposed was a determinate sentence of three years or less, regardless of how much time the person actually served. Section 40-32-101(g)(1)(C)(ii) requires that "[t]he person was sentenced to an indeterminate sentence for which the person served three (3) years or less." Again, this requirement is met if the sentence imposed was an indeterminate sentence and the person actually served three years or less, irrespective of whether the actual sentence served was less than the amount of time mandated by the statute for the offense. Therefore, under either Tenn. Code Ann. § 40-32-101(g)(1)(C)(i) or (ii), whether the actual sentence served was less than the amount of time mandated by the statute for the offense is irrelevant. *See State v. Hawkins*, 406 S.W.3d 121, 131 (Tenn. 2013) (stating rule of statutory construction that courts will look no further if the language of the statute is "clear and unambiguous" and will not unduly expand a statute's coverage beyond its intended scope).

5. A person may be an "eligible petitioner" for expunction of his or her public records involving a criminal offense if, "[a]t the time of filing [of the petition for expunction], the person has never been convicted of any criminal offense, including federal offenses and offenses in other states, other than the offense committed for which the petition for expunction is filed[.]" Tenn. Code Ann. § 40-32-101(g)(2)(A). Again, a standard rule of statutory construction is that a statute's language should be given its natural and ordinary meaning within the context of the statute as a whole without any forced or subtle construction that would limit or extend the statute's meaning. *State v. Hawkins*, 406 S.W.3d at 131; *Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 714 (Tenn. 2012). The natural and ordinary meaning of the language of Tenn. Code Ann. § 40-32-101(g)(2)(A) reveals the intention of the General Assembly to limit the application of expunction to a small category of offenders and to directly provide that a person with a criminal conviction in addition to the conviction at issue in the expunction petition cannot be an "eligible petitioner" for expunction purposes.

6. To determine whether a statute is unconstitutionally vague, courts must consider two criteria: first, the statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and, second, the statute "must provide explicit standards" to prevent "arbitrary and discriminatory enforcement." *State v. Lakatos*, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994) (internal quotations and citation omitted). The provisions of Tenn. Code Ann. § 40-32-101(g) explicitly define the meaning of "eligible petitioner" and detail the requirements to qualify for expunction of one's criminal record. The meaning of the statute's words is plain enough to be understood by "any person of ordinary intelligence." The statute, therefore, is not unconstitutionally vague.

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